Wright (Pa.) 512; *Hastings' Case*, 10 Watts (Pa.) 303; *N. Y. Life etc. Co. v. Vanderbilt* (N. Y.) 12 Abb. Pr. 458; *Herbert v. M. & L. Ass'n*, 2 C. E. Greene (N. J.) 495; *Lyman v. Lyman* (Vt.) 76 Am. Dec. 151; *Clowes v. Dickenson*, 5 Johns. Ch. 235; and in other American cases cited in American notes to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. 266–269, and in 14 Am. & Eng. Enc. Law, 686–7.

For the Virginia lawyer, further discussion is unnecessary, as the question is settled by repeated decisions of our own courts. In *Conrad v. Harrison*, 3 Leigh, 532, X mortgaged certain lands to Brock; subsequently he executed a mortgage on part of them only, to Harrison; later the whole was mortgaged to Conrad. In a contest between Harrison and Conrad, the last two incumbrancers, it was held that Harrison was entitled to be let in upon that portion not covered by his mortgage, though the effect should be to deprive the last lienor, Conrad, of all security for his debt. The judges delivered opinions, *seriatim*, the opinion of Tucker, P., being a complete vindication of the principle that the right of a second incumbrancer to the equity of marshalling cannot be affected by a subsequent lien or right acquired by a creditor or purchaser, with notice. The court had virtually held otherwise in *Beverly v. Brooke*, 2 Leigh, 425, which case, on this point, the later case overrules *arguendo*—the demolition being completed by the subsequent case of *McClung v. Beirne*, 10 Leigh, 394, and the *Conrad Case* affirmed. See also: *Henkle v. Allstadt*, 4 Gratt. 284; *Alley v. Rogers*, 19 Gratt. 366, 389; *Jones v. Phelan*, 20 Gratt. 229, 241; *Whitten v. Saunders*, 75 Va. 563, 569; *Miller v. Holland*, 84 Va. 652.

After all, the real principle involved, as shown in most of the Virginia cases just cited, is the familiar one that where an estate is subject to a paramount charge, and there are subsequent alienations of parts of the estate, either absolutely or by way of mortgage, the property must contribute to the charge in the inverse order of alienation—a doctrine which is fixed by statute in Virginia where the paramount charge is a judgment (Code 1887, sec. 3575) and equally fixed as to other incumbrances by the decisions of our Court of Appeals, above cited.

We are fully satisfied that the American doctrine stated is sound in principle, and we hereby forever forswear the contrary. Equitable considerations suggest that the author of the heretical view heretofore expressed in these pages exonerate his associates from the burden of his error. This he does by signing this retraction.

W. M. L.

LARCENY OF SOVEREIGN RECEIVED BY MISTAKE FOR A SHILLING.—In *Queen v. Ashwell*, 16 Q. B. D. 190, the facts were that Ashwell asked Keogh for the loan of a shilling. Keogh gave Ashwell a sovereign, believing it to be a shilling, and Ashwell took the coin under the same belief. Sometime afterwards Ashwell discovered that the coin was a sovereign; and then and there fraudulently appropriated it to his own use. Ashwell was tried and found guilty of larceny, and on appeal the conviction was sustained by an equal division of the judges.

Whether Ashwell was guilty of larceny at common law has been the subject of much dispute, and the question is not yet settled. In *Queen v. Ashwell, supra*, all the judges (as is explained in the later case of *Queen v. Flowers*, 16 Q. B. D. 643), concurred in holding that it is an established principle that "the innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny." [See *Hunt v. Com.*, 13 Gratt. 757; *Tanner v. Com.*, 14 Id. 635.]

But the great question in *Queen v. Ashwell* was, *at what time did the prisoner receive the chattel;* it being conceded that a period of innocent possession prior to the conception of the fraudulent intent to appropriate would negative larceny, as the taking would not be by trespass. The judges who voted for acquittal held that the prisoner's receipt or possession of the sovereign began at the instant it was handed to him by the prosecutor; while those who voted to sustain the conviction held that the prisoner did not receive the sovereign until he discovered the mistake; and that as he thereupon immediately appropriated it with fraudulent intent, there was *no interval of innocent possession*, but possession and appropriation were simultaneous. This view was thus expressed by Coleridge, C. J.:

"I assume it to be now established law that where there has been no trespass, there can at common law be no larceny. I assume it also to be settled law that where there has been a delivery—in the sense in which I will explain in a moment—of a chattel from one person to another, subsequent misappropriation of that chattel by the person to whom it has been delivered will not make him guilty of larcency, except by statute with which I am not now concerned. But then it seems to me very plain that delivery and receipt are acts into which mental intention enters, and that there is not in law any more than in sense a delivery and receipt unless the giver and receiver intend to give and to receive respectively what is respectively given and received. It is intelligent delivery, I think, which the law speaks of, not a mere physical act from which intelligence and even consciousness are absent. I hope it is not laying down anything too broad or loose, if I say that all acts to carry legal consequences must be acts of the mind, and to hold the contrary, to hold that a man did what in sense and reason he certainly did not, that a man did in law what he did not know he was doing and did not intend to do—to hold this is to expose the law to very just but wholly unnecessary ridicule and scorn. I agree with my brother Stephen that fictions are objectionable, and I desire not to add to them; but it seems to me, with diffidence, that he creates the fiction who holds that a man does what he does not know he does and does not mean to do, not he that says that an act done by an intelligent being for which he is to be responsible is not an act of that being unless it is an act of his intelligence. If it had been so decided by authority which binds me, of course I should submit; but if it had not been so decided, I take the freedom to say that it is not law—at least yet. In this case, therefore, it seems to me, there was no delivery of the sovereign to the prisoner by Keogh, because there was no intention to deliver and no knowledge that it had been delivered. Applying the same principles of reasoning, it appears to me that the sovereign was received by the prisoner and misappropriated by him at one and the same instant of time. In good sense, it seems to me that he did not take it until he knew what he had got; and when he knew what he had got at that same instant he stole it. According to all the cases, if at the very moment of the receipt of a chattel, the receiver intends to misappropriate it, and does misappropriate it, he is guilty of larceny."

It seems to us that the reasoning of Coleridge, C. J., is unanswerable, and that Ashwell was guilty of larceny. And see *Robinson v. State*, 11 Tex. App. 403 (40 Am. Rep. 790). But that it was not larceny is affirmed by Prof. Beale, of Harvard, in May's Criminal Law (2d ed.), sec. 282, end; and that it is not larceny has recently been held in Ireland, contrary, however, to the opinion of Prof. Pollock, from whom we quote (*Law Quarterly Review*, July, 1896, p. 209):

"Last year the puzzle of *Reg. v. Ashwell* recurred in an Irish court, and led to no less divergence of judicial opinion (*The Queen v. Hehir* [1895], 2 I. R. 709). The master of a ship pays a laborer his wages in what he—the master—thinks two £1 notes and some silver. One of the notes is really a £10 note. The laborer takes it innocently, finds out the mistake soon afterwards, and makes up his mind to appropriate the note. By five to four the Irish court held that this was not larceny at common law. The judgments were, perhaps, more carefully and elegantly written than in *Ashwell's* case: see especially that of Gibson, J. The lines of argument were much the same: the majority held that the prisoner had lawful possession of the £10 note by a real though mistaken delivery (in which case he clearly could not steal it at common law); the minority that he had no possession at all, but a bare custody, until he discovered the mistake, when he took the £10 note, in a legal sense, for the first time. Mr. Justice Wright's view, which is different from both of these, and upholds the conviction on the ground that there was no delivery in the first instance, but there was a trespassory though excusable acquisition of possession, capable of being made felonious by subsequent *animus furandi* (Pollock and Wright on Possession, p. 210), was referred to, but, we submit, not adequately considered. The choice lies, we think, between this and the theory of no possession at all. Either way the conviction is right."

THE LIEN OF THE WRIT OF FIERI FACIAS IN VIRGINIA.—The Code of Virginia (sec. 3581) provides that "on a judgment for money there may be issued a writ of *fieri facias*." And sec. 3587 enacts: "By a writ of *fieri facias* the officer shall be commanded to make the money therein mentioned out of the goods and chattels of the person against whom the judgment is. The writ may be levied as well on the current money and bank notes as on the goods and chattels of such person, except such as are exempt from levy under chapter one hundred and seventy-eight; and, as against purchasers for valuable consideration without notice and creditors, shall bind what is capable of being levied on only from the time it is delivered to the officer to be executed. The lien of a writ of *fieri facias* under this section, on what is capable of being levied on, but is not levied on under the writ on or before the return day thereof, shall cease on that day: *Provided, however*, that such lien may be enforced after the return day of the writ by proceedings under chapter one hundred and seventy-six, if such proceedings be commenced before that day."

Under section 3587 the officer obeys the law's command "to make the money therein mentioned [*i. e.*, in the writ of *fieri facias*] out of the goods and chattels of the person against whom the judgment is" by levy on, and sale of, so much of the debtor's goods and chattels as may be necessary. But all of a debtor's personal property is not liable to be *levied on* under a writ of *fieri facias* at common law, but only goods and chattels corporeal, or in possession, as distinguished from incorporeal personalty, or *choses in action*. The Virginia statute (sec. 3587) declares: "The writ [of *fi. fa.*] may be levied as well on the current money and bank notes as on the goods and chattels of such person" (*i. e.*, the judgment debtor); but it does not extend the right of levy to *choses in action* generally. At common law, emblements were liable to levy before severance; but the Code of Virginia, sec. 904, declares that "no growing crop of any kind (not severed) shall